(2)

No. 98-514

FILED

OCT 28 1998

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

# Supreme Court of the United States

October Term, 1998

DONALD P. DAVIS and MAXINE ELAINE DAVIS,

*Petitioners,*

*vs.*

SUN OIL COMPANY,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL R. BLUMENTHAL
*Counsel of Record*
DAVID S. HOFFMANN
McMAHON, DeGULIS, HOFFMANN
& BLUMENTHAL L.L.P.
*Attorneys for Respondent*
The Caxton Building, Suite 650
812 Huron Road
Cleveland, Ohio 44115-1126
(216) 621-1312

149362

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

18 pp

## QUESTION PRESENTED

Whether the Court of Appeals, under the standard pronounced in *Tafflin v. Levitt*, 493 U.S. 455 (1990) and *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990), properly upheld the District Court's decision construing 42 U.S.C. § 6972 as not conferring exclusive jurisdiction in RCRA citizen suits?

## STATEMENT PURSUANT TO RULE 29.6

Respondent, Sun Oil Company, has no parent companies and no nonwholly owned subsidiaries.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented | i |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Statement of the Case | 1 |
| Reasons for Denying the Writ | 3 |
| I. The Sixth Circuit's Decision Is Not In Conflict With The Decision Of Another Court Of Appeals Decision. | 3 |
| A. The Sixth Circuit is the only Circuit Court that has directly addressed the issue of whether 42 U.S.C. § 6972 confers exclusive federal jurisdiction or concurrent jurisdiction with state courts. | 3 |
| II. The Sixth Circuit's Analysis And Conclusion Regarding 42 U.S.C. § 6972 Comports With The Supreme Court's Analyses And Conclusions In *Tafflin* And *Yellow Freight*. | 5 |
| A. The language in Section 6972 is not sufficient to overcome the presumption of concurrent state and federal jurisdiction. | 5 |

*Contents*

*Page*

B. The legislative history of Section 6972 reveals no intention by Congress to confine citizen suit claims to federal courts. ..... 7

C. Congress recognized the competence of state courts to adjudicate RCRA claims when it authorized enforcement of RCRA both "in federal court and state court." ..... 8

D. Section 6972(a) contains specific venue provisions and a jurisdictional provision which does not confer exclusive jurisdiction on federal courts, a provision similar to the one in *Yellow Freight*. ..... 8

E. Petitioners' references to the Federal Rules of Procedure and specific procedures applicable to federal courts are unpersuasive. ..... 10

Conclusion ..... 10

## TABLE OF CITED AUTHORITIES

*Page*

**Cases:**

*Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094 (8th Cir. 1989) ..... 3, 4

*Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1967) ..... 10

*GMC Management Corp. v. National Ambulance Service*, No. 6075-94 (N.Y. Sup. Ct. Monroe County Sept. 11, 1998) ..... 6

*Kerr-McGee Corp. v. Farley*, 115 F.3d 1498 (10th Cir. 1997) ..... 4

*Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715 (D.N.J. 1986) ..... 3, 4

*Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996) ..... 4

*Tafflin v. Levitt*, 493 U.S. 455 (1990) ..... i, 3, 5, 10

*Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820 (1990) ..... *passim*

**Statutes:**

29 U.S.C. § 1132(e)(1) ..... 7

42 U.S.C. § 2000e-5(f)(3) ..... 6

*Table of Cited Authorities*


| | *Page* |
|---|---|
| 42 U.S.C. § 6972 | *passim* |
| 42 U.S.C. § 6972(a) | 5, 6, 8, 9 |
| 42 U.S.C. § 6972(a)(1) | 9 |
| 42 U.S.C. § 6972(a)(1)(A) | 8 |
| 42 U.S.C. § 6972(a)(1)(B) | 8 |
| 42 U.S.C. § 6972(a)(2) | 9 |
| 42 U.S.C. § 6972(b)(1)(B) | 8 |
| 42 U.S.C. § 6972(e) | 10 |
| **Rules:** | |
| Supreme Court Rule 10.1 | 3 |
| Supreme Court Rule 10.1(a) | 3 |
| **Other Authority:** | |
| H.R. Report No. 98-198, p. 53, reprinted in 1984 U.S. Code Cong. and Ad. News, p. 5612 | 7 |

## STATEMENT OF THE CASE

Petitioners seek review of the Sixth Circuit's decision which upheld the District Court's decision to dismiss Petitioners' citizen suit claim under the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972. The District Court dismissed Petitioners' Section 6972 claim based on *res judicata* because the Section 6972 claim could have been brought in state court under concurrent state jurisdiction. Prior to filing this federal action under the RCRA citizen suit claim, Petitioners filed common law claims against Respondent in state court alleging nuisance, breach of contract and fraud. Petitioners requested specific performance, and compensatory and punitive damages. The actions in both federal and state court revolved around Respondent's liability for petroleum contamination at a site in Dayton, Ohio which Petitioners previously purchased from Respondent.

While the state court action was proceeding, the federal action was stayed pending the outcome of the state action. The state court held in favor of Petitioners and awarded Petitioners damages and specific performance.

Although Respondent appealed the decision to the Ohio Second District Court of Appeals, Petitioners moved for summary judgment in the federal action on the basis that the facts necessary to prove their RCRA citizen suit action had been preclusively determined in their state court action. The District Court dismissed Petitioners' motion because Petitioners failed to establish whether the contamination on site posed "an imminent and substantial endangerment to health or the environment," which is an essential element of RCRA citizen suit claim.

On appeal, the Ohio Second District Court of Appeals upheld the lower court on all assignments of error except for the cleanup time frame requirement.

Subsequent to the state appellate court decision, Respondent filed a motion for summary judgment in the federal action arguing, *inter alia*, that Petitioners could not maintain the federal action under the doctrine of *res judicata* because Petitioners had obtained in state court all the relief they were seeking or entitled to in federal court. The District Court decided that Ohio's law on claim preclusion prevented Petitioners from maintaining the federal action. Since claim preclusion in Ohio requires an existing final judgment from a court which possesses subject matter jurisdiction over the original claim, the District Court addressed the issue of whether Petitioners' RCRA citizen suit should have been combined with the common law claims in state court.

Beginning with the presumption that concurrent jurisdiction exists unless there is a clear, unambiguous expression of exclusive jurisdiction in federal court, the District Court concluded, and the Sixth Circuit agreed, that the operative language in 42 U.S.C. § 6972 does not confer exclusive jurisdiction to federal courts. Because Petitioners failed to combine their RCRA citizen suit action with their common law claims in the state court proceedings, the Sixth Circuit upheld the District Court's decision to dismiss the RCRA claim.

## REASONS FOR DENYING THE WRIT

## I.

## THE SIXTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE DECISION OF ANOTHER COURT OF APPEALS DECISION.

### A. The Sixth Circuit is the only Circuit Court that has directly addressed the issue of whether 42 U.S.C. § 6972 confers exclusive federal jurisdiction or concurrent jurisdiction with state courts.

A review of a writ of certiorari by the United States Supreme Court is not a matter of right, but of judicial discretion and will be granted only where there are special and important reasons for such review.[1] The Supreme Court may grant certiorari when a United States Circuit Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.[2]

Petitioners cite *Blue Legs v. Bureau of Indian Affairs*, 867 F.2d 1094, 1098 (8th Cir. 1989), in support of their assertion that a conflict exists between the Sixth and Eighth Circuits on the jurisdictional issue presented by this case.[3] The Eighth

---

1. Supreme Court Rule 10.1

2. *Id.* at 10.1(a).

3. As the Sixth Circuit noted in its opinion, the only other court squarely confronted with the issue presented here is the District Court in New Jersey in *Middlesex County Bd. of Chosen Freeholders v. New Jersey*, 645 F. Supp. 715, 719 (D.N.J. 1986), another case decided before *Tafflin* and *Yellow Freight*. The Sixth Circuit rejected the reasoning and (Cont'd)

Circuit in *Blue Legs*, however, was not presented with the precise issue of whether 42 U.S.C. § 6972 confers exclusive jurisdiction in federal courts sufficient to overcome the presumption of concurrent jurisdiction with state courts. The Eighth Circuit was asked to recognize a judicial preference for exhaustion of remedies in tribal court out of deference for tribal self-government. Relative to tribal courts, the Eighth Circuit concluded that § 6972(a) placed exclusive jurisdiction over citizen suit claims in federal courts.

The issue presented in this petition is whether or not the language in Section 6972(a) clearly overcomes the presumption of concurrent jurisdiction with state courts. Unlike the jurisdictional issue presented here, there is no presumption of concurrent jurisdiction with tribal courts. Moreover, *Blue Legs* was decided before *Tafflin* and *Yellow Freight* where this Court detailed the precise analysis for determining whether a particular statute does or does not overcome the presumption of concurrent jurisdiction.

---

(Cont'd)
decision in *Middlesex*. Both the Eighth and the Tenth Circuits have stated in *dicta* that Section 6972 does confer exclusive jurisdiction to federal courts. *Reservation Tel. Coop. v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181, 185-96 (8th Cir. 1996) ("[T]he RCRA placed exclusive jurisdiction for suits brought under the RCRA in the federal courts."); *Kerr-McGee Corp. v. Farley*, 115 F.3d 1498, 1502 (10th Cir. 1997) ("[T]he 1988 Amendments [to the Price Anderson Act] do not explicitly confer exclusive federal court jurisdiction over nuclear incident litigation, as Congress has created, for example, in other contexts (referencing *Blue Legs* and 42 U.S.C. § 6972)").

## II.

## THE SIXTH CIRCUIT'S ANALYSIS AND CONCLUSION REGARDING 42 U.S.C. § 6972 COMPORTS WITH THE SUPREME COURT'S ANALYSES AND CONCLUSIONS IN *TAFFLIN* AND *YELLOW FREIGHT*.

### A. The language in Section 6972 is not sufficient to overcome the presumption of concurrent state and federal jurisdiction.

The Sixth Circuit recognized that the decisions in *Tafflin* and *Yellow Freight* are important in resolving the question of whether federal jurisdiction is exclusive in citizen suits under 42 U.S.C. § 6972:

> These two cases require that Congress either expressly states that federal jurisdiction is exclusive or in some other affirmative way overcomes the strong presumption that jurisdiction is concurrent with state courts. This doctrine is an integral part of our system of federalism. The federal courts cannot create Congressional intent, if it is left unstated, by making an assumption that federal jurisdiction should be exclusive. Rather the strong presumption is in favor of concurrent jurisdiction in the state courts.

(Citation omitted).

The pertinent language as indicated by the Sixth Circuit is as follows:[4]

---

4. See argument below regarding Respondent's assertion that the first two sentences in the second part of Section 6972(a) are venue provisions and the third sentence is the jurisdictional provision.

> Any action under paragraph (a)(1) of this subsection shall be brought in a district court for the district in which the alleged violation occurred or the alleged endangerment may occur.

42 U.S.C. § 6972(a).

The pertinent language at issue in *Yellow Freight* was as follows:

> [e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction under this subchapter.

42 U.S.C. § 2000e-5(f)(3). In *Yellow Freight*, the "shall have" language was not deemed to be sufficient evidence that Congress intended to divest state courts of jurisdiction over those matters. Likewise, the Sixth Circuit determined that the word "shall" in the RCRA enforcement provision does not grant exclusive jurisdiction to the federal courts in RCRA citizen suits.[5]

In other contexts, Congress has unequivocally stated its intent to confine particular disputes to the federal judiciary.[6]

---

5. The Sixth Circuit's decision in this case has been followed by the Monroe County Supreme Court of New York. *GMC Management Corp. v. National Ambulance Service*, No. 6075-94 (N.Y. Sup. Ct. Monroe County Sept. 11, 1998) ("When Congress enacted [Section 6972], it did not state that the Federal Court shall have exclusive jurisdiction over citizen suits under that statute, and therefore, did not revoke concurrent jurisdiction.").

6. *See, e.g.*, The Employee Retirement Income Security Act of 1974 specifies, "[e]xcept for actions under subsection (a)(1)(B) of this section, (Cont'd)

The omission in Section 6972 is strong and sufficient evidence that Congress had no such intent.

**B. The legislative history of Section 6972 reveals no intention by Congress to confine citizen suit claims to federal courts.**

There is scant evidence in the legislative record of RCRA which references jurisdictional issues. The only reference which occurs in the Congressional committee report is the following:

> Although the Committee has not prohibited a citizen from raising claims under state law in a [Section 6972] action, the Committee expects courts to exercise their discretion concerning pendent jurisdiction in a way that will not frustrate or delay the primary goal of this provision, namely, the prompt abatement of imminent and substantial endangerments.

H.R. Report No. 98-198, p. 53, reprinted in 1984 U.S. Code Cong. and Ad. News, p. 5612. It is far from explicit or obvious as to whether Congress intended exclusive jurisdiction. Like the plain text, the legislative history is silent on the role of state courts over Section 6972 claims.[7]

---

(Cont'd)
the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter," but that "[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section." 29 U.S.C. § 1132(e)(1).

7. *See Yellow Freight*, 494 U.S. at 825.

**C. Congress recognized the competence of state courts to adjudicate RCRA claims when it authorized enforcement of RCRA both "in federal court and state court."**

Petitioners have not argued that RCRA's statutory scheme would be disrupted by the exercise of state court jurisdiction or that state courts are not competent to hear RCRA claims. Nonetheless, Congress recognized the competence of state courts to decide RCRA enforcement claims in Section 6972(b)(1)(B).[8]

**D. Section 6972(a) contains specific venue provisions and a jurisdictional provision which does not confer exclusive jurisdiction on federal courts, a provision similar to the one in *Yellow Freight.***

The first part of Section 6972(a) authorizes two kinds of actions: (1) citizen suit actions against anyone who may be violating any provision of RCRA or anyone who contributes to the handling, storage, treatment, transportation or disposal of solid or hazardous wastes which may present an imminent and substantial endangerment;[9] and (2) citizen suit actions against the Administrator for failing to perform a non-discretionary act under RCRA.[10]

---

8. Section 6972(b)(1)(B) states that no citizen enforcement action may be commenced "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action *in a court of the United States or a State* to require compliance with such permit, standard, [etc.]" (emphasis added).

9. Section 6972(a)(1)(A).

10. Section 6972(a)(1)(B).

The latter part of Section 6972(a)[11] specifies that actions under division (a)(1) "shall be brought in the district court for the district in which the alleged violation occurred or the alleged endangerment may occur." Actions under division (a)(2) "may be brought in the district court for the district court in which the violation occurred or in the District Court of the District of Columbia." As the District Court noted in its decision, the first two sentences in this part of Section 6972(a) specify venue.

The third sentence in the latter portion of Section 6972(a), similar to the Title VII provision at issue in *Yellow Freight*, clearly contains the jurisdictional component of this statute:

> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce the permit, standard, . . . referred to in paragraph (1)(A), to restrain any person who has contributed or who is contributing to the past or present handling, storage, . . . of any solid or hazardous waste referred to in paragraph (1)(B), . . .

The above cited provision is nearly identical to the provision at issue in *Yellow Freight*. It contains the "shall have" language identical to the provision in Title VII and no unequivocal statement that the jurisdiction of the federal courts is exclusive. As this Court conclusively determined in *Yellow Freight*, such language cannot overcome the presumption of concurrent jurisdiction that lies at the core of our federal system.[12]

---

11. Beginning with: "Any action under paragraph (a)(1) of this subsection shall be brought . . ."

12. *Yellow Freight*, 494 U.S. at 461.

**E. Petitioners' references to the Federal Rules of Procedure and specific procedures applicable to federal courts are unpersuasive.**

Petitioners' references to the Federal Rules of Civil Procedure in Section 6972(e), intervention and required notices in actions filed in federal court are unpersuasive. Similar arguments have been raised in other cases and rejected by this Court. [13]

## CONCLUSION

No other Circuit Court of Appeals, other than the Sixth Circuit, has been presented with the jurisdictional interpretation of 42 U.S.C. § 6972. Since no conflict exists between the Circuit Courts on this issue, Petitioners' request for a writ of certiorari should be denied.

Other factors militate against the petition. The Sixth Circuit's analysis comports with the analysis of jurisdictional components of federal statutes outlined in this Court's decisions in *Yellow Freight* and *Tafflin*. Under this Court's jurisprudence and our system of federalism, state courts are presumed to have concurrent jurisdiction over federal laws, unless Congress clearly and unambiguously specifies otherwise.

Nothing in the several provisions of 42 U.S.C. § 6972 supports the withdrawal of state court jurisdiction.

---

13. *See Yellow Freight*, 494 U.S. at 825-26; *Tafflin*, 493 U.S. at 466-67; *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1967).

Respectfully submitted,

MICHAEL R. BLUMENTHAL
*Counsel of Record*
DAVID S. HOFFMANN
McMAHON, DeGULIS, HOFFMANN
& BLUMENTHAL L.L.P.
*Attorneys for Respondent*
The Caxton Building, Suite 650
812 Huron Road
Cleveland, Ohio 44115-1126
(216) 621-1312